

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KANSAS WORKERS COMPENSATION FUND

Docket No. 144,226 and
145,503

ORDER

ON the 7th day of December, 1993, the application of the Claimant and Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, on October 11, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Robert E. Lee, of Wichita, Kansas. The respondent and insurance carriers appeared by their attorney, D. Steven Marsh, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Orvel B. Mason, of Arkansas City, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as stated in the Award of October 11, 1993.

STIPULATIONS

The Appeals Board adopts and incorporates by reference the stipulations stated by the Administrative Law Judge in the Award of October 11, 1993.

ISSUES

The issues presented by oral argument to the Appeals Board were:

Docket No. 144,226

- (1) Whether claimant incurred personal injury by accident arising out of and in the course of employment during the period alleged;
- (2) Nature and extent of disability;
- (3) Liability of the Kansas Workers Compensation Fund.

Docket No. 145,503

- (1) Whether claimant incurred personal injury by accident arising out of and in the course of employment on the date alleged;
- (2) Nature and extent of claimant's disability;
- (3) Whether respondent has been prejudiced by claimant's alleged failure to provide notice;
- (4) Liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW**Docket No. 144,226**

(1) The Appeals Board adopts the findings of fact and conclusions of law as set forth in the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, that are not inconsistent with those specifically set forth herein.

Claimant alleges that he met with personal injury by accident arising out of and in the course of his employment with the respondent during the period of July 24, 1989 through March 27, 1990. Claimant alleges injury to both of his elbows, shoulders, and hands and arms as a result of repetitive mini-trauma.

Claimant began work at Coleman Company, Inc., in March 1988. By June 1988, claimant saw the company physician with complaints of pain and swelling in his left forearm. Temporary work restrictions were given. In July 1989, claimant had symptomatology in both shoulders, hands, and elbows. Claimant sought treatment from company physician Dr. Littell who concentrated his treatment on the right elbow which was swollen. Although claimant was having pain in the left elbow, he did not seek treatment for it as it was not swollen. Dr. Littell returned claimant to work without restrictions on August 14, 1989. Since July 1989, claimant has experienced popping and grinding in both elbows. In addition, claimant has experienced catching and locking in the left elbow since July 1989. At the time claimant's symptoms began in July 1989, claimant was performing repetitive, forceful activities with his hands and arms as he was installing and removing tooling from a drill press.

The next significant event occurred in April 1990, when claimant's left elbow locked. The day before, claimant spent several hours pulling on a belt while repairing his drill press. Ultimately, the claimant received treatment from board certified orthopedic surgeon, Tyrone Artz, M.D., who performed left elbow surgery on February 14, 1991. After surgery, the left elbow markedly improved. Presently, claimant has an arthritic process in the elbow and may require additional treatment such as injections, medication, and additional surgery.

When Dr. Artz first saw claimant in June 1990, he found bilateral carpal tunnel syndrome. Claimant initially did not want treatment for the carpal tunnel syndrome, but later changed his mind. Dr. Artz performed right carpal tunnel release in May 1992, and left carpal tunnel release in December 1992. Dr. Artz released claimant to return to work in March 1993, and he now earns more than he did at the time of injury.

Based upon the evidence contained in the entire record, the Appeals Board finds that claimant has experienced a compensable injury to his upper extremities as a result of his work activities with respondent during the period of the alleged date of accident of July 24, 1989 through March 27, 1990, when he sought additional treatment from respondent's medical department for increased symptomatology in his upper extremities. Claimant's work activities on July 24, 1989, caused initial injury to the upper extremities which

progressively worsened as a result of the work activities performed up to and including March 27, 1990. For purposes of computation of this award, March 27, 1990, shall be designated the date of accident.

(2) Claimant has experienced bilateral carpal tunnel syndrome as a result of the work related injury he experienced through March 27, 1990, for which he should receive permanent partial general disability benefits.

The Appeals Board is unable to find that claimant has experienced a permanent injury to his shoulders as a result of his work activities with the respondent. The history regarding shoulder complaints is nebulous. The record indicates that claimant has had aching muscles in his shoulders for a number of years and is unable to relate the symptoms to a specific incident or activity. Claimant also testified that the symptoms in his shoulders improved when he obtained the position of press operator in the Spring of 1989 and left the more repetitive work required in his former position in packout.

The treating physician, Dr. Artz, believes that claimant has experienced a five percent (5%) permanent impairment of function to the left forearm and a five percent (5%) permanent impairment of function to the right forearm, which converts to four percent (4%) impairment of function to the body as a whole due to the operated bilateral carpal tunnel syndrome. Dr. Artz does not believe claimant has permanent impairment to the right elbow nor to the shoulders. The left elbow will be addressed more at length in the findings pertaining to Docket No. 145,503, below.

Ernest R. Schlachter, M.D., examined claimant pursuant to his counsel's request. Dr. Schlachter did not initially rate claimant's right elbow for permanent impairment, but subsequently, when pushed by respondent's counsel during the doctor's deposition, did indicate that claimant might have some functional impairment to the elbow. Dr. Schlachter found that claimant had experienced a five percent (5%) impairment of function to the body as a whole due to the right shoulder condition which he diagnosed as overuse syndrome of the shoulder girdle with rotator cuff tendinitis. Dr. Schlachter believes that claimant has experienced a ten percent (10%) impairment of function to his right upper extremity and a ten percent (10%) impairment of function to the left upper extremity as a result of the bilateral carpal tunnel condition. According to the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised), ten percent (10%) impairment of function to both upper extremities converts to twelve percent (12%) impairment of function to the body as a whole.

It is well settled that simultaneous injury to the hands and arms resulting in bilateral carpal tunnel syndrome is compensable as an injury to the body as a whole. Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986); Downes v. IBP, Inc., 10 Kan. App. 2d 39, 691 P.2d 42 (1984).

For nonscheduled injuries, permanent partial general disability is the extent to which the ability to perform work in the open labor market and to earn comparable wages has been reduced taking into consideration the employee's education, training, experience and

capacity for rehabilitation; except that in any event the permanent partial general disability shall not be less than the functional impairment. Kansas law also provides that there shall be a presumption of no work disability if the claimant subsequent to his injury and recovery earns wages comparable to those he was earning at the time of the accident. See K.S.A. 1992 Supp. 44-510e.

The claimant has returned to work for the respondent and now earns more than what he was earning during the period of his accident. Therefore, the presumption of no work disability applies. There being no evidence to overcome the presumption, claimant is entitled to permanent partial general disability benefits based upon functional impairment.

Based upon the medical evidence presented, claimant has experienced permanent impairment of function to the body as a whole in the range of four to twelve percent (4-12%) as a result of his operated bilateral carpal tunnel syndrome. Based upon claimant's relatively good recovery, the Appeals Board finds that claimant should receive permanent partial disability benefits for this injury based upon an eight percent (8%) impairment of function to the body as a whole.

(3) The Kansas Workers Compensation Fund is liable for fifty percent (50%) of the cost and compensation paid out pursuant to this injury and award.

K.S.A. 1992 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with the description of the handicap claim, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment..."

In order to shift liability to the Workers Compensation Fund the employer must knowingly employ or retain a handicapped employee, as defined in K.S.A. 1992 Supp. 44-566. The Appeals Board finds that the respondent retained claimant in its employment with knowledge that claimant had a physical impairment of such character that it would be a handicap in obtaining employment.

The testimony of Wanda K. Roehl establishes that the respondent had knowledge of claimant's preexisting impairment to his hands and arms. Immediately before or after beginning work for respondent, claimant advised respondent that his past medical history included pain, numbness, and weakness in his hands while working for a local meat

packing plant in the late 1970's. Claimant also advised the respondent that periodically he would have similar symptoms, although not as severe, when he would work for a local meat locker during the deer season. Once this information was received, the respondent filed its Form 88 (Notice of Handicap, Disability or Physical Impairment) with the Director of the Division of Workers Compensation. The Form 88 was received by the Division of Workers Compensation on July 8, 1988. Ms. Roehl directed that the form be filed as it was respondent's experience that anyone with a history of problems to the point they experience numbness and tingling are predisposed to problems such as carpal tunnel syndrome if they are ever to work a job requiring repetitive or forceful activities. Ms. Roehl has been employed with respondent for 21 years and since 1988 has been manager of its safety and workers compensation department. Ms. Roehl manages respondent's safety programs, industrial hygiene programs, and all workers compensation claims as may occur, and is knowledgeable of the relationship between repetitive activities and carpal tunnel syndrome.

Due to the symptoms in his hands and arms that claimant periodically experienced beginning in the late 1970's, the Appeals Board finds that claimant did have a preexisting condition that would constitute a handicap in his obtaining or retaining employment. Based upon the testimony of witness Wanda Roehl, the Appeals Board finds that the respondent did have knowledge of the impairment and properly filed the Notice of Handicap with the State Division of Workers Compensation.

K.S.A. 1992 Supp. 44-567(a)(2) provides:

"Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, *the director shall determine in a manner which is equitable and reasonable the amount of disability in proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment*, and the amount so found shall be paid from the workers' compensation fund." (emphasis ours.)

Dr. Schlachter is the only witness who testified regarding whether claimant's injury or disability probably or most likely would not have occurred but for the preexisting physical impairment. A close reading of Dr. Schlachter's testimony indicates that claimant's injury and disability most probably would have occurred notwithstanding his preexisting physical impairment. Although it is argued by respondent's counsel that claimant's development of bilateral carpal tunnel syndrome would not have occurred but for the physical impairment that existed prior to his employment at Coleman Company, Inc., the Appeals Board finds the hypothetical questions asked Dr. Schlachter did not accurately reflect the history of claimant's symptoms and complaints.

The doctor repeatedly stated that the hypothetical questions did not contain

sufficient facts for him to determine the nature of claimant's condition prior to his beginning work for Coleman Company, Inc. The doctor stated it was important to know more regarding claimant's symptomatology while working at the meat packing plant. The information ultimately given the doctor did not correspond to claimant's testimony that his symptoms resolved once he stopped using the knives while at MBPXL. Dr. Schlachter's testimony does establish, however, that the claimant's preexisting physical impairment contributed to fifty percent (50%) to the ultimate impairment. Therefore, the Kansas Workers Compensation Fund is liable for fifty percent (50%) of the cost and compensation arising from this award.

Docket No. 145,503

(1) The Appeals Board adopts the findings of fact and conclusions of law as set forth in the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, that are not inconsistent with those specifically set forth herein.

On April 28, 1990, claimant injured his left elbow at work while working on his drill press. Claimant's injury occurred arising out of and in the course of his employment with the respondent.

(2) As indicated in the findings set forth in Docket No. 144,226, above, claimant ultimately came under treatment by Dr. Artz who operated on the left elbow on February 14, 1991. During the synovectomy, no loose bodies were found but it did reveal marked synovitis of the elbow joint. Claimant has an arthritic process of the elbow and may require additional treatment such as injections, medication, and additional surgery. Dr. Artz released claimant to return to work on March 25, 1991, and believes that claimant has experienced a ten percent (10%) impairment of function to the left upper extremity due to the arthritic elbow and mild limited motion.

Dr. Schlachter evaluated claimant at his counsel's request and found partial ankylosis of the left elbow that equates to twenty percent (20%) impairment of function to the left upper extremity.

Based upon the physicians' testimony, claimant has experienced a ten to twenty percent (10-20%) impairment of function to the left upper extremity as a result of the elbow injury of April, 1990. For purposes of computation of this award, the Appeals Board finds that the claimant should receive permanent partial disability benefits based upon a fifteen percent (15%) functional impairment rating.

(3) The respondent had timely notice of claimant's injury of April, 1990. Claimant reported to the plant manager, Dave Smith, that his left elbow locked within one or two days of the incident. Claimant then prepared an accident report. The Appeals Board finds that notice was properly given.

(4) The Kansas Workers Compensation Fund has no liability under this docket number. Dr. Artz testified that he has no opinion regarding any impairment that claimant may have had prior to June, 1990. Dr. Schlachter testified that the ankylosis of the left elbow secondary to the inflammatory bursitis was not related to any preexisting overuse syndrome, and, therefore, there is no contribution to the bursitis from any preexisting condition. When examining the mechanics of injury and medical testimony, the evidence fails to establish contribution or that the injury to the left elbow would not have occurred but for a preexisting condition or impairment. Therefore, the respondent is solely responsible for the cost and payment of compensation for this award.

AWARD

Docket No. 144,226

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, is modified, as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREIN ENTERED in favor of the claimant, Michael D. Mitchell, and against the respondent, Coleman Company, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury sustained during the period of July 24, 1989 through March 27, 1990. For the purpose of computation of this award, the last day of accident is used.

The claimant is entitled to 415 weeks of permanent partial compensation at the rate of \$26.84 per week totaling \$11,138.60, for an eight percent (8%) partial general bodily disability. As of January 17, 1994, there would be due and owing to the claimant 199 weeks of permanent partial compensation at \$26.84 per week for a total due and owing of \$5,341.16 which is ordered paid in one lump sum less amounts previously paid. Thereafter the remaining balance in the amount of \$5,797.44 shall be paid at \$26.84 per week for 216 weeks or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled to payment of any outstanding, authorized, medical expense; and any unauthorized medical expense up to the statutory maximum of \$350.00.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed fifty percent (50%) against the respondent and fifty percent (50%) against the Kansas Workers Compensation Fund to be paid directly as follows:

BARBER & ASSOCIATES	
Transcript of Regular Hearing	\$ 387.70
Deposition of Ernest R. Schlachter, M.D.	\$ 272.40
Deposition of Tyrone D. Artz, M.D.	\$ 185.60
Total	\$ 845.70
DEPOSITION SERVICES	
Deposition of Wanda K. Roehl	\$ 261.60
IRELAND AND BARBER	
Transcript of Preliminary Hearing	\$ 240.45
DON K. SMITH & ASSOCIATES	
Deposition of Michael D. Mitchell	\$ 299.50

Docket No. 145,503

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated October 11, 1993, is modified, as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREIN ENTERED in favor of the claimant, Michael D. Mitchell, and against the respondent, Coleman Company, Inc., and its insurance carrier, Continental National American Group, for an accidental injury sustained on April 28, 1990.

The claimant is entitled to 31.5 weeks of permanent partial disability benefits at the rate of \$271.00 per week totaling \$8,536.50, for a fifteen percent (15%) loss of use of the left arm. As of the date of this order, the entire award is due and owing and is ordered paid in one lump sum less amounts previously paid.

The claimant is entitled to unauthorized medical expense up to the statutory maximum of \$350.00.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

IT IS SO ORDERED.

Dated and mailed this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert R. Lee, 1861 North Rock Road, Suite 320, Wichita, Kansas 67206
D. Steven Marsh, 301 North Main, Suite 600, Wichita, Kansas 67202
Orvel B. Mason, P.O. Box 739, Arkansas City, Kansas 67005-0739
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director